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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT TACOMA

10                 SYLVESTER JAMES MAHONE,

11                 Plaintiff,

12                 v.

13                 DOUG THAUT,

14                 Defendant.

Case No. C04-5463RJB

ORDER

15                 This matter comes before the Court on Plaintiff's Motion to Compel Discovery (Dkt. 127-1)  
16 and Motion for Court Appointed Expert Witness (Dkt. 129-1). The Court has considered the  
17 pleadings filed in favor and in opposition to these motions, and the file herein.

18                 **I. FACTS AND PROCEDURAL HISTORY**

19                 On July 13, 2005, United States Magistrate Judge J. Kelley Arnold issued a Report and  
20 Recommendation addressing 1) whether Plaintiff's claims regarding the handling of his legal mail  
21 should be summarily dismissed, 2) whether Plaintiff's claims regarding medical treatment (a specific  
22 medical emergency as a result of a pepper spray incident and other medical care) should be  
23 summarily dismissed, and 3) whether Plaintiff's claims regarding the conditions of his confinement  
24 should be summarily dismissed. Dkt. 103. The specific facts in this case are recounted at length in  
25 the Report and Recommendation and shall not be repeated here, except as is relevant to the pending  
26 motions.

27                 On August 25, 2005, all Plaintiff's claims in this matter, except claims dealing with a pepper  
28 spray incident, were dismissed when the Report and Recommendation was adopted. Dkt. 112. All

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1 Defendants were dismissed except Defendant Thaut, who was involved in the pepper spray incident.

2 *Id.*

3 This pepper spray incident was captured, in part, on a video tape. The tape contains another  
4 inmate's attempted suicide. In an attempt to gain control of the inmate, prison guards used pepper  
5 spray on the inmate attempting suicide. Plaintiff was housed in a cell nearby. Dkt. 103-1, at 4.  
6 Plaintiff argues he declared a medical emergency off camera, and his declaration is on the video tape.  
7 Dkt. 127-1 at 2. Plaintiff propounded three sets of interrogatories, in late 2004 and 2005,  
8 requesting, in part, relevant recordings of the incident. Dkt. 127-2, Dkt. 126-2. Defendants  
9 provided what they considered relevant portions of the tape. Dkt. 126-2. Defendants sent a letter to  
10 Plaintiff on February 11, 2005 and spoke to Plaintiff in person in November 2005 about not  
11 providing the entire tape for what Defendants argue were security reasons. *Id.* at 3. However, the  
12 remaining Defendant produced the entire tape on December 20, 2005. Dkt. 134.

13 On December 22, 2005, Plaintiff moved the Court for an order compelling the Defendant to  
14 produce the entire tape of the suicide incident, not just the portion of the tape Defendant contended  
15 was relevant to Plaintiff's claims. Dkt. 127-1. Plaintiff seeks sanctions and reasonable attorneys  
16 fees. *Id.*, at 6.

17 Plaintiff also moves the Court for appointment of an expert who he wants to examine the  
18 tapes produced by Defendant for tampering and editing. Dkt. 129-1. Plaintiff contends that both  
19 tapes have been "edited" where Mahone yelled out he was declaring a medical emergency to  
20 Defendant Thaut." Dkt. 129-1, at 3. Plaintiff provided both video tapes for review.

21 **II. DISCUSSION**

22 **A. MOTION TO COMPEL**

23 Plaintiff's Motion to Compel Discovery (Dkt. 127-1) should be denied as moot. Defendant  
24 has produced the entire tape for Plaintiff before the motion was filed. Plaintiff is not an attorney, and  
25 fails to point to any authority which holds that non-attorneys are entitled to attorney's fees.  
26 Moreover, sanctions under Fed. R. Civ. P. 37(a)(4)(A) should not be awarded where the sought after  
27 discovery was provided. Plaintiff's Motion to Compel should be denied as moot.

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1           **B. MOTION FOR COURT APPOINTED EXPERT**

2           A district court has authority to appoint a neutral expert upon its own motion or on motion  
3 of a party under Fed. R. of Evid. 706. *Students of Cal. School for the Blind v. Honing*, 736 F.2d  
4 538, 549 (9th Cir. 1984) *vacated on other grounds*, 471 U.S. 148 (1985). The district court's  
5 decision under Rule 706 is reviewed for abuse of discretion. *Vizcaino v. Microsoft Co.*, 290 F.3d  
6 1043, 1051, n.7 (9th Cir. 2003).

7           Upon review of the video tapes, there is no indication that either of the tapes have been  
8 tampered with or edited. Plaintiff has failed to show any basis upon which an expert should be  
9 appointed. Plaintiff's motion for appointment of an expert should be denied.

10          **III. ORDER**

11 Therefore, it is hereby **ORDERED** that:

12 Plaintiff's Motion to Compel Discovery (Dkt. 127-1) is **DENIED AS MOOT** and Motion for  
13 Court Appointed Expert Witness (Dkt. 129-1) is **DENIED**. The Clerk is directed to send copies of  
14 this Order to Plaintiff, counsel for Defendant, and to the Hon. J. Kelley Arnold.

15 DATED this 27<sup>th</sup> day of February, 2006.

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18           Robert J. Bryan  
United States District Judge

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